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No. 91-356

IN THE

Supreme Court of the United States

October Term, 1991

THE MEAD CORPORATION,
Petitioner

vs.

B.E. TILLEY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN ACADEMY OF ACTUARIES AND AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF PETITIONER

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The American Academy of Actuaries and the American Society of Pension Actuaries submit this brief, as amici curiae, pursuant to Rule 37 of the Rules of the Supreme Court of the United States in support of petitioner in No. 91-356, having obtained the written consent of both the petitioner and the respondents to file same. Said written consent accompanies this brief.

I. STATEMENT OF INTEREST OF AMICI CURIAE

The American Academy of Actuaries (the " Academy") is a nonprofit professional organization of actuaries formed in 1965 to bring into one organization actuaries of all specialties within the United States, and to seek accreditation and greater public recognition for the profession. In order to join the Academy, prospective members must satisfy rigorous education and experience requirements. The Academy's main focus is the economic, public policy and social environment in which the actuarial profession functions. Its primary activities include liaison with federal and state governments, relations with other professions, the dissemination of public information about the profession and issues that affect it, and the development of standards of professional conduct and practice. The current membership exceeds 10,000.

The American Society of Pension Actuaries ("ASPA") is a nonprofit organization whose membership consists of more than 3,000 persons engaged in the design and administration of retirement plans, and in providing both actuarial and consulting services with respect to such plans. Its membership includes enrolled actuaries, certified pension consultants, plan administrators, attorneys, accountants, and others concerned with the private pension system. ASPA has as one of its primary purposes the preservation and growth of the private pension system.

II. INTRODUCTION

The Fourth Circuit below erroneously redefined the liabilities that must be paid to employees before a reversion may be paid to an employer when any overfunded pension plan terminates. In its opinion the court below fundamentally distorted two key concepts utilized by the actuarial profession in deter-

mining the proper disposition of pension trust funds upon termination of any pension plan under the Employee Retirement Income Security Act ("ERISA"). As we told the court below in our amicus brief supporting rehearing and rehearing en banc, the Mead Plan incorporated both of these concepts, and "Mead's Plan and all others contain virtually identical terms regarding the . . . liabilities that must be paid before a reversion of surplus assets can occur."

First, the Fourth Circuit majority rendered meaningless the term "actuarial error" which, until this decision, was uniformly understood to be — and was defined by the Internal Revenue Service ("IRS") to be — merely the difference between an overfunded plan's assets and its liabilities, i.e., the surplus which may, if the plan so provides, be recovered by the sponsor when the plan terminates. The court below held that "actuarial error" cannot encompass sums contributed to a plan to fund future plan benefits that later do not become payable because the plan terminated before plan participants had earned the benefits. In point of fact, it is just such contributions that have been the primary source of reversions to employers in thousands of plan terminations approved by both the IRS and the Pension Benefit Guaranty Corporation ("PBGC"), the two agencies which share regulatory authority in this area. Therefore, the majority's mistaken view of "actuarial error" — if allowed to stand — would have the extremely serious effect, in most cases, of outlawing the reversion of surplus assets.

Second, the opinion below misconstrues an IRS regulation and related rulings which are part of the regulatory framework establishing a plan's liabilities upon termination. Those liabilities have never been understood by the actuarial profession (or by IRS and PBGC) to include benefits that have not been earned under the terms of the plan as of the time of plan termination. The decision below, however, interprets a portion of a

1943 IRS regulation to require that one type of such unearned benefits — unearned subsidized early retirement benefits — be regarded as "contingent" plan liabilities payable upon plan termination. Since most pension plans contain some form of early retirement benefits, as well as other benefits that are payable only after certain specified plan requirements are met, the Fourth Circuit majority's decision casts doubt on the correctness of the calculation of the benefits paid under thousands of plans that have terminated. Indeed, the court's holding effectively nullifies the Retirement Equity Act of 1984 ("REA") which prospectively amended ERISA to require that early retirement subsidies become plan liabilities — but only if and when they are fully earned by continued service with the plan sponsor, after plan termination.[1]

The majority received but did not consider the views of the IRS and the PBGC, the agencies responsible for administering the portions of ERISA and the Internal Revenue Code which are pertinent here. The views of those agencies are not only relevant, but are entitled to great weight. The agencies' views are completely at odds with the decision below.

III. BACKGROUND

In 1983 Mead sold its subsidiary, the Lynchburg Foundry Company (the "Foundry"), terminated the pension plan covering the Foundry's salaried employees (the "Mead Plan"), and took an $11 million reversion of surplus plan assets.

[1]REA's effective date was July 30, 1984. It does not apply to the plan termination at issue in this case, which took place in 1983. However, as explained *infra* at 16-17, by failing to recognize the conflict between its decision and REA, the court below created intolerable problems for administering plan terminations to which REA does apply.

The Mead Plan provided a normal retirement benefit at age 65. It also contained an unreduced or "subsidized" early retirement benefit for employees with 30 years of service who retired after age 62;[2] the subsidized benefit was payable immediately upon early retirement and was equal to the portion of the age 65 normal retirement benefit earned to date with no actuarial reduction on account of early payment. Only employees who had met the criteria for receiving this subsidized benefit received it when the Plan terminated. The central question in this case is whether, before a reversion of surplus assets can occur, ERISA or the Internal Revenue Code requires that any part of the subsidized early retirement benefit must be paid as a plan liability to participants who do not satisfy the plan's age and service requirements for earning that benefit.

Both the IRS and PBGC have answered this question in the negative — unearned early retirement benefits do not have to be paid upon termination of a pension plan. Plan actuaries and other professionals, following the guidance of the regulatory authorities, have consistently given the same advice in tens of thousands of plan terminations. The court below disagreed. While the precise legal basis for its decision is unclear, the court below embraced the notion that, since the surplus assets that were returned to Mead contained sums that were originally contributed by Mead to provide benefits the respondents expected to receive at some future time, and since Mead — not the respondents — terminated the plan, the respondents should be entitled to some of the surplus.

[2]Plan Art. § 2(b) (Petitioner's Appendix ("App.") 94a.)

[3]Because the monthly benefit is not reduced to take into account the additional payments to be made before age 65, a subsidized benefit is more valuable than the participant's accrued normal retirement benefit which provides the same payments beginning at age 65.

This case has been before the court below twice, and before this Court once. Upon its first consideration of this case in 1987, the Fourth Circuit focused upon § 4044(a)(6) of ERISA which requires that plan assets be used to satisfy "all other benefits under the plan" before a reversion can occur. The court below held that that section of ERISA required unearned subsidized early retirement benefits to be paid "even if those benefits were not accrued at the time of plan termination," quoting with approval the Second Circuit's opinion in *Amato v. Western Union Intern'l., Inc.*, 773 F.2d 1402 (1985), which stated that "as long as assets were available, they should be used to meet participants' benefit expectations . . . ." 773 F.2d at 1416. This Court granted certiorari and reversed. *Mead Corp. v. Tilley,* 490 U.S. 714 (1989) (App. 33a). On remand to the Fourth Circuit, a majority of the panel below held that the provisions of the Mead Plan incorporating IRS regulations requiring that all surplus assets that revert to the employer be due to "actuarial error" and requiring that "contingent" liabilities be satisfied upon plan termination meant that "employees who, with reason, expected to receive the unreduced early retirement benefits" (App. 12a) must prevail again.[4] The court below reached that result in spite of the fact that the IRS and the PBGC advised the court that those regulations did *not* require that unearned early retirement subsidies be paid before a reversion can take place.

The Fourth Circuit's opinion is wrong. Unless reversed, it poses a major threat to the viability of defined benefit pension plans.

[4]The Fourth Circuit majority's decision also seems to conflict with the lone dissenting opinion written by Justice Stevens when this case was last before this Court. Although Justice Stevens' dissent is not completely clear, he would apparently require participants in the Mead Plan to have had 30 years of service prior to the date of plan termination and to reach age 62 in order to receive any early retirement subsidy from the Plan (App. 46a).

IV. THE THEORY BEHIND THE DECISION IS WRONG

The Fourth Circuit's theory that pension funds exist to satisfy participants' benefit expectations, and that such expectations must always be satisfied when a plan terminates with excess assets reflects a serious misunderstanding of how defined benefit pension plans, such as the Mead Plan, work.

Every pension plan is either a defined benefit or defined contribution pension plan. (ERISA § 3(35)). Defined benefit plans provide benefits which are typically calculated by a formula which states or "defines" the plan benefit, e.g., $100 per month for each year of service at age 65. Contributions to a defined benefit plan are calculated by choosing an actuarial funding method and actuarial assumptions regarding such factors as investment return on contributions, employee turnover, and compensation projections.[5] Each year the plan's actual experience is compared with the assumptions and the employer's ensuing contribution is adjusted — up or down — to compensate for assumptions that proved to be too high or too low. If, for example, the assumed investment return is 8 percent and the actual return for a particular year is 6 percent, the employer's future contributions will be increased so that funds will be adequate to pay benefits as they become due.[6] Because benefits are paid according to the plan's formula, no particular part of the pension fund is earmarked for any one participant.

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[5]*See*, Allen, Melone, Rosenbloom, and VanDerhei, ***Pension Planning***, Ch. 8 (6th Ed. 1988). Assumptions for each type of benefit differ. For example, an actuary would typically assume far fewer employees would ultimately qualify for a benefit payable upon retirement after age 62 and 30 years of service than would qualify for the regular age 65 pension which requires no minimum years of service. Actuarial assumptions are also based on the the premise that the plan is an ongoing entity and will not terminate.

[6]In fact, the actuarial assumptions themselves are reviewed periodically and changed if necessary in light of plan performance.

By contrast, in a defined contribution plan, the employer's annual contribution is allocated among individual participants' accounts[7] and invested by the plan's trustee. Participants are not promised any particular level of benefit; the benefit each receives is simply the amount of contributions allocated to his or her individual account, increased or decreased to reflect investment return. Unlike a defined benefit plan, the employer does not make up poor investment returns with increased contributions — participants simply receive a smaller benefit.

It is often said — correctly — that in a defined benefit plan, such as the Mead Plan, the risk of loss or reward of gain is borne by the employer; in a defined contribution plan the risks and rewards are borne by the employee.

When a defined benefit plan terminates, if plan assets exceed benefit liabilities, the excess assets may be returned to the employer. ERISA § 4044(d)(1)(A); IRC § 401(a)(2). When a defined contribution plan terminates, there are no excess assets and no reversion is possible because benefits simply equal the amounts in all participants' accounts.

The Fourth Circuit's majority opinion, as Judge Chapman's dissent recognizes (App. 23a-24a), seeks to impose defined contribution plan characteristics upon defined benefit plans by requiring the employer to share excess plan assets with employees who have not earned them by satisfying the plan's explicit benefit criteria. It does so on the theory that if the benefits have been funded for employees who expected them, the employees' expectations should not go unfulfilled.[8]

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[7]The allocation is usually based on each participant's prorata compensation.

[8]No fewer than seven times in its decision, the court below referred to the parties' "expectations" concerning unreduced early retirement benefits. *(See,* App. 12a, 13a).

That theory is deeply flawed. If the benefits were not "expected" — at least in the actuarial sense — they would not have been funded in the first place. That there are excess assets upon plan termination simply means that the actuarial assumptions turned out to be too conservative in light of the benefits actually earned at the time of the plan's termination. The Fourth Circuit has created an intolerable rule that requires an employer to bear the burden of increased contributions when assumptions prove to have been too optimistic, while mandating that the employer also give up the excess at termination when the plan's performance has exceeded the actuarial assumptions and resulted in surplus assets.

V. THE FOURTH CIRCUIT'S OPINION MISINTERPRETS IRS REGULATIONS AND CONFLICTS WITH THE HOLDINGS OF OTHER COURTS OF APPEAL

The decision below focuses on the provisions of the Mead Plan which implement a 1943 IRS regulation regarding plan terminations. That regulation was promulgated under what is now section 401(a)(2) of the Internal Revenue Code of 1986 ("IRC"). IRC § 401(a)(2) prohibits a reversion of pension trust funds to the employer "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries."[9] Two aspects of the regulation, and IRS rulings under it, are at issue here.

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[9]Similarly, ERISA § 4044(d)(1)(A) provides that residual plan assets may revert to the employer only if "all liabilities of the plan to the participants and their beneficiaries have been satisfied." The liabilities that must be satisfied under IRC § 401(a)(2) and ERISA § 4044(d)(1)(A) are the same. *See*, Mead's Petition for Certiorari at 3-4 and PBGC's Brief in Support of Mead's Petition for Rehearing and Suggestion for Rehearing En Banc (App. 187a).

A. The Requirement That Surplus Funds Be Attributable to Actuarial Error.

IRS regulations explain that IRC § 401(a)(2) permits the employer upon plan termination to recoup the trust balance due to "erroneous actuarial computation" or, stated another way, "the surplus arising because actual requirements [of the trust] differ from the expected requirements." Treas. Reg. § 1.401-2(b)(1) (App. 73a). The Mead Plan thus provides for the return of "any surplus remaining in the Retirement Fund due to actuarial error". Art. XIII, § 4(f) (App. 122a). As is obvious from the regulation, and, as IRS rulings confirm, the term "actuarial error" is simply shorthand for the difference between the plan's assets and liabilities: "when fixed and contingent liabilities are discharged . . . the remaining assets may be considered surplus arising from actuarial error and revert to the employer." Rev. Rul. 83-52, 1983-1 C.B. 87 (App. 74a).

The Fourth Circuit, however, chose to ignore the plain import of the IRS regulation and revenue ruling and decided that

> '[a]ctuarial' error seems to reference computational error resulting from inaccurate statistical assumptions. If the Plan's actuary had used precise statistical assumptions regarding the future value of Plan assets and the requirements of its beneficiaries, the Plan would have contained a surplus upon termination — the amount contributed in expectation of satisfying the pensioners' unreduced early retirement benefits, which Mead later decided not to pay. (App. 12a).

The court below was confused. Had the actuaries used "precise statistical assumptions", including an accurate prediction of the precise date on which the plan would terminate, there would have been no surplus and no reversion. The IRS, in defining "actuarial error" as it did in Revenue Ruling 83-52,

knows and understands this. The Assistant Commissioner of the IRS has explained that ruling as follows:

> Even though upon plan termination there are excess assets which are considered to result from erroneous actuarial computations, that does not mean that mistakes in the usual sense were made by actuaries. In estimating the actual future benefits that will be provided under a plan, the actuary makes many assumptions as to future investment earnings, mortality, employee turnover, salaries, and so forth, generally on the basis that the plan will not terminate.
>
> As I have described earlier, at a particular point in time under some level funding methods, the plan assets will exceed the value of accrued benefits. In addition, actuarial assumptions are almost never exactly or precisely realized, and in many cases actual experience may have been more favorable than assumed, such as investment performance exceeding that which was assumed. In such cases, actual plan assets may exceed expected plan assets. If such plans terminate with excess assets, the erroneous actuarial computation results primarily because the termination of the plan was not assumed when the computations were made.[10]

Other courts that have considered this issue agree. See, Mead's Petition for Certiorari at pp. 19-20. Thus, the IRS recognized that "actuarial error" can occur as a result of correctly calculating contributions if at the time of plan termination the plan's assets exceed the benefits earned to date. The majority below, however, concluded exactly the opposite, in-

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[10]Plan Asset Raid Hearing Before the Select Committee on Aging, House of Representatives, 98th Cong., 1st Sess., 104 (1983) (statement of S. Allen Winbourne, Asst. Commr.).

terpreting "actuarial error" to *exclude* "correctly calculating the contribution to a fund" when, in the court's view, that contribution is for "paying a benefit that the company later decides to cancel." (App. 13a).[11]

The majority's view of "actuarial error" was obviously influenced by its theory that benefit expectations should not go unfulfilled if there are funds available to meet them, especially if the plan is unilaterally terminated by the sponsor. As we have shown above, that theory is incorrect and without legal basis.

B. The Requirement That A Terminating Plan Discharge Contingent Obligations.

IRS regulations further require that the liabilities that must be satisfied upon plan termination under IRC § 401(a)(2) include a plan's "contingent" obligations. As even the court below recognized (App. 13a), there are obligations to all employees who are covered by a terminating plan, not just to those who have already retired. IRS regulations provide:

> [I]f 1,000 employees are covered by a trust forming part of a pension plan, 300 of whom have satisfied all the requirements for a monthly pension, while the remaining 700 employees have not yet completed the required period of service, contingent obligations to such 700 employees have nevertheless arisen which constitute 'liabilities'. . . .

Treas. Reg. 1.401-2(b)(2) (App. 73a).

[11]The majority's opinion is sprinkled with hints that Mead should be punished for its actions, as is evident from its references to benefits "Mead later decided not to pay" (App. 12a) or "the company later decides to cancel" (App. 13a). In fact, the Mead Plan, as do most, permitted termination by Mead at any time. *See*, Art. XIII, § 4(a) (App. 122a). In this case the plan was terminated because Mead's subsidiary was sold to another company, an act hardly deserving punishment.

In five revenue rulings since the regulation was promulgated, the IRS has defined those "contingent obligations" to be the "benefit credits accrued" under a plan at the time of its termination. Rev. Rul. 53-33, pt. 3(d), 1953-1 C.B. 267, 274; Rev. Rul. 57-163, pt. 3(d), 1957-1 C.B. 128, 138; Rev. Rul. 61-157, pt. 3(d), 1961-2 C.B. 67, 79; Rev. Rul. 65-178, pt. 3(d), 1965-2 C.B. 94, 110; Rev. Rul. 69-421, pt. 3(d), 1969-2 C.B. 59, 69. In order to comply with the regulation and rulings, the Mead Plan provided for a reversion of surplus assets "after the satisfaction of all benefit rights or contingent rights accrued under the Plan. . . ." (App. 122a). The majority below held that since the Plan's subsidized early retirement benefit was payable upon the completion of age and service requirements, it was a contingent liability under the "plain meaning" of the regulation and the Plan. (App. 14a).[12]

The majority, however, inexplicably ignored the word "accrued" — which appears in both the Mead Plan and the IRS revenue rulings — finding instead that "contingent rights accrued" could not possibly refer to early retirement subsidies

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[12]In 1962, the IRS agency position that all accued benefits must become fully vested upon plan termination was codified in IRC § 401(a)(7), later renumbered by the enactment of ERISA as IRC § 411(d)(3). In a different and unanimous portion of its decision (which is not at issue here), the court below correctly held that early retirement subsidies are not included within the scope of IRC § 411(d)(3) "accrued benefits." *See*, App. 6a. Other courts have agreed that early retirement subsidies are not accrued benefits. *See*, *Bencivenga v. W. Pa. Teamsters & Employers Pension Fund*, 763 F.2d 574, 580 (3d Cir. 19 85), *Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1525 (3d Cir. 1988), cert. denied, 109 S.Ct. 3155 (1989), *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1192-95 (4th Cir. 1989), *American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986, 994 (10th Cir. 1991). Further, the PBGC's longstanding position has been that unaccrued benefits are not included in any of the priority categories that encompass the liabilities of a plan. *See*, PBGC Brief in Support of Mead's Petition for Rehearing and Suggestion for Rehearing En Banc, App. 186a-187a, 29 CFR §§ 2618.2, 2618.16 and 2618.30.

already earned or to "accrued benefits" under ERISA (App. 14a). More significantly, the court below ignored the following facts: (1) at the time of plan termination, both the IRS and PBGC reviewed and approved the Mead Plan proposed termination distributions,[13] and (2) the IRS and PBGC specifically told the court that unearned early retirement subsidies are not payable under ERISA or the Code as "liabilities" of a terminating the plan.[14]

The reason behind the court's strained conclusion is perhaps revealed in its statement that "[b]ecause Mead's termination of the Plan was what prevented the pensioners from satisfying the conditions[15] so that unreduced early retirement benefits could vest, the terms of the Plan allow the surplus funds to revert to Mead only after the unreduced early retirement benefits are satisfied." (App. 15a). This reasoning is wrong. Moreover, the Court of Appeals for the Third Circuit reached precisely the opposite result in a case on all fours with this case. *Nobers v. Crucible, Inc. 1975 Salaried Retirement Plan*, Nos. 90-3463, 90-3540 (3d Cir. Jan. 29, 1991) (App. 161a, 163a). Finally, the "benefit expectations" theory underlying the conclusion has been rejected by the Eleventh, Fifth and Third Circuits. *See, Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1176 (11th Cir. 1988) (en banc), *May v. Houston Post Pension Plan*, 898 F.2d 1068, 1070 (5th Cir. 1990), *Ashenbaugh*, 854 F.2d at 1529.

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[13]Mead's Plan administrator, using typical fiduciary prudence, sought and received an IRS determination letter (App. 159a) and PBGC Notice of Sufficiency (App. 156a) upon the plan's termination.

[14]*See*, Dept. of Justice letter to U.S. Court of Appeals for the Fourth Circuit (App. 167a), and Brief of PBGC (quoted in Mead's Petition for Certiorari at p. 8).

[15]It should be noted that whether any employee will ever satisfy plan criteria for a benefit cannot be known until it actually occurs. An original plaintiff to this action, David H. Wall, died after the plan termination apparently before reaching age 62. (App. 3a).

VI. THE FOURTH CIRCUIT'S DECISION CREATES INTOLERABLE UNCERTAINTY AS TO THE PROPER METHOD OF CALCULATING BENEFITS FOR PLAN TERMINATIONS

The Fourth Circuit majority's misunderstanding of the law and disregard for the rules promulgated by the agencies responsible for administering ERISA is extremely troubling. The court below was not dealing with an obscure or new IRS regulation or with unusual plan provisions. Indeed, IRS regulation § 1.401-2(b)(2) requires every pension trust to "contain a definite affirmative provision to th[e] effect" that "[i]t must be impossible for the employer to recover any amounts other than such amounts as remain in the trust because of 'erroneous actuarial computations' after the satisfaction of all fixed and contingent obligations." (App. 74a). The regulation does not require that its exact wording be copied into a plan; rather, it merely requires a statement to the same "effect" as the regulation. Thus, plans do not contain identical phrases. As we have stated at the outset, however, the provisions in the Mead Plan are like those found in thousands of other plans.

The majority's comment below that "[w]hether ERISA would compel payment of the benefits in absence of such language in the plan is a question that is unnecessary to answer" is absurd. "Such language", as even the court below recognized, is present *because* of ERISA and the Code.[16] Not just Mead's Plan, but every tax qualified plan must contain provisions to describe the regulation.[17] On a daily basis, plan

[16]According to th majority, "[t]he terms of the plan were written in light of the regulation". (App 14a).

[17]The Mead Plan contains many provisions aimed at maintaining its qualification. *See* the provisions of the Mead Plan described in Mead's Petition at pp. 13-14. Indeed, the Plan expressly deems null and void *any* provision which is "unenforceable or in conflict with any of the provisions of Section 401 of the Internal Revenue Code." Art. XV, § 4. (App. 125a).

fiduciaries interpret their plan provisions in a manner consistent with this IRS regulation and the rulings which explain it. As this Court recognized in *Firestone Tire & Rubber Co. v. Bruch*, when the fiduciaries administering a plan have discretion to interpret plan terms, fiduciary decisions about payment of benefits should not be second guessed by a court unless they represent a clear "abuse of discretion." 489 U.S. 101, 115 (1989).[18]

A holding contrary to accepted practice, unsupported by any analysis of the views of the agencies responsible for enforcing ERISA, is dangerous and will operate as an invitation to reopen thousands of plan terminations under which assets were thought to have been distributed correctly. The decision below casts doubt not only upon the propriety of every reversion, but also upon the correctness of the amount of benefits paid, under every terminated plan that contained early retirement benefits.

The decision below also makes it impossible to know how to terminate plans attempting to comply with the Retirement Equity Act of 1984 ("REA"). For plan terminations occurring after July 30, 1984, REA requires that the plan must make provision to pay unreduced early retirement benefits to participants who — *after* plan termination — satisfy the criteria for the benefit through continued service with the plan sponsor. If the criteria are later satisfied, the subsidized benefit under REA is calculated with reference only to the participant's pre-termination service. IRC §411(d)(6)(B), Rev. Rul. 85-6, 1985-1 C.B. 133.

REA was enacted to provide an additional benefit to those employees who eventually retire from the plan sponsor after

[18]The Mead Plan fiduciaries had discretion to interpret plan terms. Article XI, § 1(b)(ii). There was no abuse of discretion here since the Mead Plan fiduciaries' decision not to pay benefits was approved by the IRS and the PBGC. *See*, n. 13, *supra*.

plan termination and after meeting the age and service requirements for the plan's unreduced early retirement benefit. As our memberships have always understood, the protections enacted by REA augment a participant's accrued normal retirement benefit which becomes fully vested upon plan termination. The court below postulated that the enactment of REA was a mere "clarification" of the law (App. 11a), yet its holding is more expansive than REA since the court failed to recognize that REA requires early retirement benefits to be earned through continued service after the plan terminates. Indeed, the effect of the decision of the court below is to nullify REA — at least in the Fourth Circuit.

By refusing to recognize that REA worked a change in the law by expanding the liabilities that must be paid under terminating plans (*see*, Judge Chapman's dissent, App. 27a-29a), the majority's holding poses an intolerable dilemma for the actuarial profession: for plans terminating now, are unearned unreduced early retirement benefits (1) payable immediately to employees who have not earned them because they constitute "contingent" liabilities, or (2) payable as REA provides — only if and when the participant later retires after having met the eligibility requirements for the benefit?

VII. CONCLUSION

For the foregoing reasons, the Academy and ASPA respectfully submit that Mead's Petition for Certiorari should be granted.

Respectfully submitted,

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